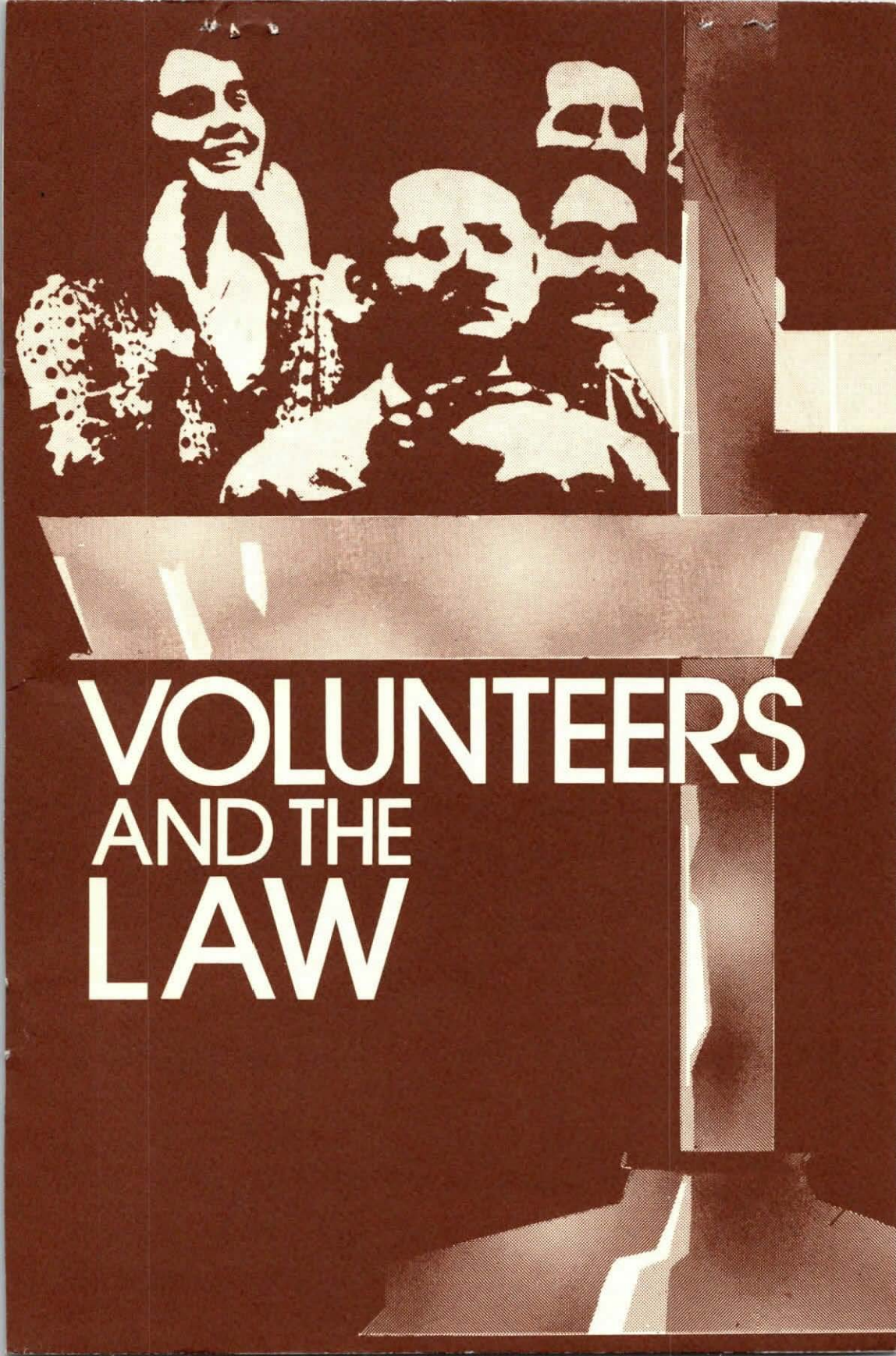

VOLUNTEERS AND THE LAW

Graphic from 1980 National Volunteer Week poster produced by VOLUNTEER: The National Center for Citizen Involvement.

VOLUNTEERS AND THE LAW

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INTRODUCTION

This handbook was prepared for volunteers as a guide to their legal rights and responsibilities. It is hoped that the information provided will assist volunteers and the agencies which they serve in assessing and minimizing the risks associated with volunteer activity. Volunteers donate their valuable time and skills for the benefit of the community and deserve the fullest protection.

The legal rights and responsibilities of volunteers are, in many cases, indistinguishable from those of paid staff or "the man on the street". Volunteer law is not a specialized legal subject. This handbook focuses on legal issues which are most likely to arise in the context of volunteer activity.

WHAT IS A VOLUNTEER

The traditional definition of a volunteer is one who performs services without financial reward. Voluntary efforts are not limited to institutional settings, and the word "volunteer" can be used to describe a person who helps his neighbour build a fence or a sunbather who comes to the rescue of a drowning child. The range of volunteer occupations is endless: volunteers are involved in recreation, corrections, social work, management, art, education, day care, manual labour, clerical work, construction and numerous other activities within the field of human endeavour.

I THE LEGAL RESPONSIBILITIES OF VOLUNTEERS

1. THE VOLUNTEER'S DUTY OF CARE

What happens if a volunteer is in charge of a group of children on an outing and a child is injured accidentally or by another child? The injured child's representative could bring a court action against the volunteer for negligence. Liability for negligence is perhaps the most important legal issue affecting volunteers.

Statute vs. the Common Law

Negligence is a cause of (court) action developed from the common law. There are two sources of law in Canada: 1.) legislation, which includes acts of the federal and provincial parliament, regulations and by-laws; and 2.) the common law which is judge-made law formulated by decided cases. The law of negligence is to be found largely in law reports or books of precedents. Negligence is a tort, which is a civil wrong in contrast to a criminal offence. Assault, trespass, false imprisonment and defamation are examples of other torts. Parties to a tort action are the plaintiff (the injured party) and the defendant (the alleged wrongdoer).

Elements of Actionable Negligence

There are three basic elements which an injured party must prove to succeed in a negligence action: The plaintiff must show that the defendant owed him a duty of care, that this duty was violated and that the plaintiff suffered damages.

Duty of Care

A duty of care is a duty to avoid carelessly injuring another and may comprise a duty to warn of a hazard,

or a duty to control the conduct of other persons including the plaintiff.

The duty derives from the relationship between the parties. Where two parties enter into a contract, each party assumes a duty of care in the performance of his part of the bargain. A duty of care is imposed on employees, agents, trustees, directors and the professionals in the execution of their designated responsibilities. The law case of **Donoghue v. Stevenson,** a decision of the English House of Lords which has been followed in Canada, established that "a duty of care is owed to any person so closely and directly affected by my act that I ought reasonably to have him in contemplation as being so directly affected when I am directing my mind to the acts or omissions that are called in question". In other words, I owe a duty of care to anybody who could be injured by my actions, provided such injury is reasonably foreseeable. This is commonly referred to as the "neighbour principle". Since volunteers are not employees, their duty of care is likely to proceed from this principle. In the above example, the volunteer owes a duty of care to the children under his charge, because it is reasonably foreseeable that they could be closely and directly affected by the volunteer's actions.

Breach of Duty of Care

A breach of the duty of care is the second essential element of negligence. This involves conduct which does not measure up to an appropriate standard. The test most often applied to determine the appropriate standard is: What would the reasonable man have done? This is an objective test and it is no excuse to say "I didn't know there was a risk of injury ", if the reasonable man would have known.

In some cases, the court will impose a different standard. Where the alleged wrongdoer is a child, the court will first determine what a reasonable

child of like age, intelligence and experience would have done, and then consider the qualities, defects and actual experience of the particular child. Thus a child volunteer is likely to be held to a lower standard of care than would an adult volunteer.

Teachers and school authorities are required to display a higher degree of care towards school children. The careful parent, not the reasonable man, is the yardstick for measuring the requisite standard, and the relevant question is: What would a careful parent have done?

A higher standard of care is also owed to handicapped persons.

Damages

There is no liability for negligence without damages. The injury must have been foreseeable, not merely a remote possibility.

Damages are not recoverable for certain types of injury. In the past, it was only possible to recover for emotional suffering or nervous shock if there was also a physical injury sustained. Nervous shock was accordingly labelled as "parasitic" damages. Recovery for this form of injury is gradually becoming more available, however, as exceptions to the rule continue to evolve. It has been held that one can recover damages for shock sustained as a result of injury to oneself or a near relative or from witnessing an accident or the immediate aftermath. More recently, the English House of Lords has extended relief to a mother who, although not at the scene of an accident involving her husband and children, visited them in hospital two hours later and suffered nervous shock on seeing their condition.

Policy Considerations

There are a number of extraneous factors which may

influence a court's decision in a negligence action. The court may fear that allowing the plaintiff to recover in a particular action would elicit a flood of litigation and impose an intolerable burden on the courts. This concern is commonly referred to as the floodgate argument. In the same vein, the court may be concerned with evidentiary problems associated with certain injuries. The symptoms of nervous shock, for example, are easily fabricated, and the court may wish to deny recovery to avoid false claims in the future. The court may consider legislative reform more appropriate than judicial law reform and refrain from granting a judgment that would alter or extend the law in any way.

Insurance is an important consideration. The court may prefer to allocate the loss to the party most likely to be insured. The loss is thereby distributed among a larger population, namely those who pay insurance premiums. The utility of the activity in which the plaintiff was engaged at the time of the alleged wrongdoing is another factor which could affect the ultimate determination of liability. The court may not wish to impose liability where a finding of negligence is likely to discourage others from participating in a socially desireable activity. This is an important consideration in the volunteer context, as volunteerism is beneficial to the community and its promotion is in the public interest.

Negligence Cases Involving Volunteers

English and Canadian case law suggests that although there is no duty to volunteer, once a person undertakes to do a particular act, gratuitously (without pay), that person assumes a duty to use reasonable care.

This principle, known as "mandate" was established in **Coggs v. Bernard**, an English case involving a gratuitous promise to transport goods. The court in that case recognized that the injured party had

trusted the volunteer and relied on his undertaking.

The need to protect people who depend on volunteers must be balanced against the need to encourage volunteer activity. In a recent British Columbia case, **Smith v. Horizon Aero Sports Ltd.**, a voluntary organization was excused from liability for negligence because:

> **... it is in the interests of society that voluntary efforts directed to promoting excellence and safety in any field of endeavor are to be encouraged. If the standard expected from a non-profit organization is put too high, such organizations may depart the field.**

The concerns expressed in this statement led to the development in the United States of a doctrine of charitable immunity which provided charitable organizations with complete freedom from liability for any torts which they committed. This doctrine is gradually eroding and has been abolished in the majority of the states.

The argument advanced in the British Columbia decision may be indicative of current Canadian trends and could be applied to individual volunteers as well as voluntary organizations. Until there is more case law on the subject, it cannot be stated with certainty whether the standard of care required of a volunteer is that which the reasonable man would exercise or a lower standard.

Liability of Agency for Volunteer's Conduct

An agency may be held responsible for the negligent conduct of its volunteers. There are a number of grounds for imposing liability on the organization. According to the principle of vicarious liability, a master is liable for the tortious acts of his servant where the servant is acting within the scope of his employment. A master/servant relationship

is generally an employer/employee relationship; however, the case law indicates that such a relationship may exist where the services are provided on a volunteer basis. The test for determining whether a volunteer is a servant is the degree of direction and control that the agency maintains over the volunteer's activities. An organization which controls, or has the right to control, a volunteer's performance assumes the role of master and may be held vicariously liable for the volunteer's negligence even though it is not directly at fault.

An agency is vicariously liable only if the volunteer acts within the scope of his employment. Scope of employment is a broadly defined concept. A servant is considered to be acting within the scope of his employment whenever he performs an authorized act, even if he performs it in an improper manner. A volunteer who is authorized to drive an elderly person to the shopping centre may be acting within the scope of his employment if he does so under the influence of alcohol, since drinking while driving may be considered an improper mode of performing the authorized activity. The principle of vicarious liability is not confined to negligence cases, and an organization could be liable where a volunteer commits an assault on a child, if the assault is regarded as an improper mode of performing the authorized act of supervising the child.

The reason for this broad interpretation is probably a desire to allocate the loss to the party most likely to be insured. In most cases, the agency is protected by insurance while the servant is a "man of straw" with few financial resources.

An organization could be found directly liable for a volunteer's negligence on the ground that it owed a duty of care to the injured party which could not be delegated to any other person. Accordingly, the agency is responsible for ensuring that reasonable care is taken by all of its staff members, agents and volunteers. This "non-delegable" duty argument is not often raised, but it has been applied to

hospitals. Recently, the Supreme Court of Canada has held that a public hospital is not an insurer of the quality of the services it provides; however, a member of the public is entitled to expect that the hospital has picked its medical staff with great care.

The selection of incompetent personnel is another reason for imposing direct liability on an organization that utilizes volunteers. Where a volunteer injures someone, the agency may be found negligent because it did not exercise adequate care at the hiring stage.

Where an agency is found directly or vicariously liable for the negligent conduct of a volunteer, the volunteer is not thereby excused from liability. An injured party would be entitled to recover the full amount of his damages from either the volunteer or the agency.

2. DUTY OF CONFIDENTIALITY

Volunteers engaged in social work, emotional support services, professional assignments and other activities often acquire information on the understanding that it will remain confidential.

Effect of an Oath

The fact that a volunteer signs an "oath of confidentiality" whether or not sworn in the presence of a notary public is of no legal consequence. Testimony given under oath in court or an oath sworn for use as evidence in court has legal implications because a person who swears a false oath in these circumstances could be prosecuted for perjury, an offence under s. 120 of the Criminal Code. An oath of confidentiality is in a different category, because it is a promise to do something in the future and is made primarily to protect the privacy of others, not for

its evidentiary value. There is no legislation which imposes a penalty for breaching this type of oath.

An oath of confidentiality may be effective from a practical point of view. A person who takes such an oath may feel a stronger moral obligation to respect the confidentiality of the information he acquires as a volunteer. The oath also serves as evidence that the volunteer was aware of his duty of confidentiality in the event that this issue is raised in a court action.

Breach of Confidence

A duty of confidentiality acknowledged verbally or in writing may be legally enforceable, and a volunteer who breaches this duty by disclosing confidential information may be liable for damages. A person injured by the wrongful disclosure may be entitled to sue for breach of confidence. This cause of action is a recent addition to the law of torts and is generally used in a commercial setting where one party has made a profit from disclosing confidential information to the financial detriment of another. For example, an employee who sells a trade secret to his employer's competitor may be liable in a breach of confidence action for the financial loss which his employer suffers as a result.

The information which most volunteers are required to keep confidential is of a personal, rather than a business nature and the injury which could result from its disclosure is generally not financial but emotional or psychological. It is not clear whether a breach of confidence action is appropriate in this situation. There is an English case in which a wife obtained a court order to prevent her husband from publishing confidences she made to him during their marriage, but that case involved communications between spouses, which the law has traditionally attempted to protect, and the action was not a suit for damages. A recent decision of the Supreme Court

of Canada, **Slavutych v. Baker,** also suggests that the breach of confidence action is not confined to commercial situations. In that case, a university professor was dismissed for incompetence because of a report which he submitted on the assurance that it would remain confidential. The court held that it is wrongful to rely on information given in confidence to the detriment of the communicator. Whether this principle applies when the detriment is merely emotional suffering or embarrassment has not yet been determined, as the plaintiff's loss in the **Slavutych** case was ultimately financial.

Invasion of Privacy

A volunteer who discloses intimate details of a person's private life is invading that person's privacy. In the United States, invasion of privacy is a recognized cause of action. In Canada, no such court action has been formally recognized except by provincial statute and the Quebec Superior Court has held that there is no right to privacy guaranteed by the Canadian Bill of Rights (now included in the Canadian Charter of Rights and Freedoms under the new constitution). The effect of the new Charter has yet to be determined by the courts. Some provinces such as British Columbia and Newfoundland recognize invasion of privacy as a tort, but it is not clear whether or not the tort so recognized would embrace an action for breach of confidence. In the province of Alberta, there is no legislation creating a cause of action for invasion of privacy and a volunteer who breaches his duty of confidentiality is unlikely to be found liable for invasion of privacy.

Intentional or Negligent Infliction of Nervous Shock

A volunteer who discloses confidential information may be liable for inflicting nervous shock. If the volunteer does so maliciously, the injured party is entitled to damages, as the injury is intentional.

Intentional infliction of nervous shock is a recognized cause of action which has been extended to embrace practical jokes and statements made with reckless disregard for the consequences. In such cases, the courts have assumed that the defendant had the necessary intent in view of the likelihood of injury. The step from inferring intent where injury is probable to imposing liability for negligence where the injury is reasonably foreseeable is arguably small, and some legal commentators suggest that the law recognizes an action for negligent infliction of mental suffering.

If such an action is feasible, a volunteer could be liable for inadvertently revealing confidential information. The status of this action was called into question in a recent English case, **D. v. National Society for the Prevention of Cruelty to Children,** involving a report of suspected child abuse. The parents of the child sued the Society which had received the report and conducted an investigation. The mother of the child suffered emotional shock, as the allegation was untrue, and the parents sued in negligence. In a pre-trial motion one judge, Lord Denning, stated that an action for negligent infliction of mental suffering would be an unwelcome extension of the present law. The issue has not yet been resolved, however, as the court refused to rule on the validity of the action and left the matter to be determined at trial. To date, there is no report of the trial.

At present, the law imposes limitations on the scope of recovery for nervous shock in negligence cases (see page 3). As these restrictions disappear, the action for negligent infliction of nervous shock gains a stronghold and may eventually provide grounds for imposing liability on a person who inadvertently reveals a confidence.

Confidentiality of Hospital Records

Under s. 40 of the Alberta Hospitals Act, information

obtained from hospital records is to be treated as private and confidential, and disclosure of such information in any manner that could be detrimental to the personal interests, reputation or privacy of a patient is prohibited. Any person who knowingly and wilfully releases this information to an unauthorized person is guilty of an offence and liable to a maximum fine of $100 or, in default of payment, imprisonment for a maximum of fifteen (15) days. This section of the Act is not limited in application to medical personnel alone and may affect a volunteer working in a hospital who has access to information contained in patients' records.

Privileged Communications: Testifying in Court

Imposing a penalty or liability for damages on a person who reveals a confidence is one way in which the law may protect confidential communications. Another way of protecting such communications is to grant a privilege to the recipient of the information. Privilege is the right to remain silent in court. Marital communications and confidential information exchanged between a solicitor and his client are examples of privileged communications. A lawyer may refuse in court to produce confidential documents which passed between him and his client or repeat a statement made to him by his client in confidence. No such privilege extends to communications between doctors and their patients or social workers and their clients, although the court may grant a privilege in any case where the harmful consequences of disclosure outweigh the benefits to the parties and the public. If a volunteer is called to testify and asked on the stand to disclose confidential information, his right to remain silent will depend on the court's assessment of these competing policy considerations.

3. DEFAMATION: LIBEL AND SLANDER

A volunteer is not likely to be sued for disclosure of personal and confidential information in view of the publicity that court action necessarily entails. The risk of liability is much higher if the information relayed is exaggerated or untrue. The dissemination of false information which is likely to bring a person into hatred, contempt or ridicule is grounds for a defamation suit.

Under s. 1(b) of the Alberta Defamation Act, defamation of character has two forms: libel, which is printed; and slander, which is spoken.

Insinuations, photographs and even expressions of sympathy can constitute defamatory material. An intent to defame is not a prerequisite to liability, and the test for defamation is not the intended but ordinary meaning of words.

The old adage that one must not speak ill of the dead has had little impact on the law of defamation, as only living persons can be defamed. Corporations can sue for defamation, however, and injury to business as well as personal reputation is actionable.

Under s. 2(2) of the Defamation Act, when defamation is proved, damage is presumed. It is not necessary to show that one was actually injured by the defamatory remark.

Publication of the injurious information is an essential element of defamation. "Publication" means communication to a person or persons other than the plaintiff, not "making public" in the usual sense of the word. A person may be liable in a defamation action for merely repeating a rumour to a friend or keeping a letter terminating an employee on file where it may be read by office personnel.

There are several defences to a defamation claim. If the information is true, it is not defamatory. It is no defence, however, to argue that the statement is an accurate report of what someone else said, as that would provide a ready justification for spreading

rumours. On the other hand, one may report as a matter of fact that a charge was made without incurring liability for defamation.

In some cases, the law extends protection to people who make disparaging comments about others. Statements made by members of Parliament in the course of proceedings in the House, comments made during court proceedings and communications between husband and wife are not characterized as defamatory.

Where it is in the interests of the community that a statement be made with impunity, the law may protect the communicator. For example, a previous employer is not liable for giving a reference, nor is a citizen who responds to a police request for information about a crime.

Legislation may sanction the communication of injurious information. Under s. 3(4) of the Alberta Child Welfare Act, no action lies against a person who reports suspected child abuse or neglect, unless the reporting is done maliciously or without reasonable and probable grounds for belief.

Another answer to a defamation claim is the defence of fair comment. A fair comment on a matter of public interest, such as government, public services and works of art on public display, is not defamatory, provided it is clearly an opinion, conclusion or criticism and not a statement of facts. A statement of opinion unaccompanied by the facts on which the opinion is based will be treated as a statement of fact. Under s. 9(1) of the Defamation Act the defence of fair comment does not fail merely because the commentator did not express his own opinion. Under s. 9(2) of the Act, the defence is not available if the comment is made maliciously.

Section 4 of the Defamation Act provides partial relief to a defendant who offers a written apology to the injured party prior to a court action. The apology may be admitted as evidence in court to reduce the amount of damages payable.

Libel is a criminal offence as well as a civil wrong, and a person who publishes a defamatory libel may be prosecuted under s. 264 and s. 265 of the Criminal Code. Section 264 involves libel which is known to be false, and a person convicted under this section is liable to imprisonment for five (5) years. Knowledge that the libel was false is not required under s. 265 of the Code, and a person convicted under this section is liable to imprisonment for two (2) years.

Defamation is a complex topic. More detailed information on this subject is available in various texts on defamation and tort law. **The Law of Torts** by John G. Fleming was the principal source used in the preparation of this brief summary of the law of libel and slander.

1. THE VOLUNTEER WORKING WITH CHILDREN AND DEPENDENT ADULTS

Standard of Care

There are a number of factors affecting the standard of care owed to children and dependent adults: the age, intelligence and experience of the child, the extent of disability affecting the dependent adult and the degree and nature of the responsibility which the volunteer assumes are major considerations. In some cases, the court is likely to impose a parental standard of care, particularly where a volunteer is engaged as a teacher. Again, the policy of promoting volunteerism advocates a lower standard.

Effect of Parental Consent

Where the parent or guardian of a child signs a consent form authorizing his child's participation in an activity, this act does not necessarily relieve the agency or volunteer from liability for negligence. Where mere participation in the activity presents a risk to the particular child, the consent will protect the agency or volunteer from liability for allowing the child to participate. The parent of a child with asthma could not argue that a volunteer

was negligent in taking his child on an all-day hike if the parent was fully informed of the activity and consented to his child's participation. However, if the child were injured as the result of the volunteer's failure to supervise properly the children under his charge, the consent would not protect the volunteer or agency sponsoring the activity. The parent or guardian's consent is not a licence to be careless without legal consequences.

To be effective, a consent form should be endorsed by the child's legal guardian. Under the Alberta Domestic Relations Act, parents are the joint guardians of a minor, and a mother of an illegitimate child is the sole guardian of the illegitimate minor. A court may appoint some other person to be a child's guardian. Where a child has reached the age of discretion, which generally is not less than seven (7) years and depends on the child's maturity and intelligence, parental consent is not necessary as the child may consent on his own behalf.

Contributory Negligence

A court may find that a child or dependent adult is responsible in part for damages sustained as a result of a volunteer's negligence. The courts will make this finding only if the child or dependent adult understood the risks involved and could have prevented or reduced the injury. Contributory negligence on the part of a child or dependent adult affects the amount of damages recoverable. A child who is fifty per cent (50%) responsible for his own injury will probably be awarded only fifty per cent (50%) of his damages.

Abandonment

Although a volunteer is free to discontinue his volunteer activity, he may be liable for doing so in some circumstances. The court could regard the abandonment

of the activity as negligence if someone were injured as a result. Generally there is no liability for failure to act unless failure to act (nonfeasance) is regarded as acting improperly (misfeasance). For example, a volunteer baby-sitter who decides to discontinue baby-sitting and leaves a child to its fate is acting improperly and may be liable in a negligence action for any resulting injury to the child.

Abandoning a child is also a criminal offence under s. 200 of the Criminal Code of Canada and persons with only temporary responsibility for a child may be prosecuted under this section.

Corporal Punishment

A volunteer in charge of a group of children may find that some form of discipline is required. What if a volunteer in a day care centre spanks a child for misbehaving? The use of corporal punishment involves the risk of liability for assault.

Assault is both a civil wrong and a criminal offence under s. 244 of the Criminal Code. Criminal assault is the intentional application of force or the attempt or threat, by act or gesture, to apply force to another person without the victim's consent. Physical contact is not necessary, nor is it essential that any injury be sustained. As a civil wrong, assault is any action that gives rise to an apprehension of impending harm. The actual application of force to another is a battery which is a separate cause of action, although the term "assault" is often used to describe both assault and battery.

There are a number of defences to an allegation of assault. Assault is an intentional tort or offence and the defendant or accused may argue that his actions were accidental. Motive is an important consideration If an action is socially desirable, it will not give rise to liability. For example, a doctor who operates on a patient without his consent in an emergency or

a fireman who grabs a by-stander to prevent him from running into a burning building is not likely to incur liability for assault. The consent of the person allegedly assaulted is another available defence. Consent need not be express, but may be implied by a general course of conduct. A person with authority to inflict corporal punishment may rely on such authority as a defence to an allegation to assault. Under the common law, a parent or one who stands in the place of a parent has the authority to discipline a child with reasonable force. This principle is codefied in s. 43 of the Criminal Code as follows:

> **Every school teacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.**

The courts have given a restrictive interpretation to the term "standing in the place of a parent" and the Latin equivalent **"in loco parentis".** In **R. v. Ogg-Moss,** a recent Ontario decision, the court held that a residential counsellor in a hospital for the mentally retarded was not a person standing in the place of a parent under s. 43 of the Criminal Code, although the counsellor had direct daily care of the residents. In an English case in 1921, the court held that an elder brother who had previously been in charge of the household while his father was away at war, was not **in loco parentis** after his father returned and had no right to strike his younger brother merely because he was impudent. Cases in which persons have been regarded as **in loco parentis** for the most part involve step-parents or relatives who have assumed the obligations of a parent toward the child.

It would seem from the case law that the defence of reasonable correction would not be readily available to volunteers who are not teaching and who have not received authorization from the child's parents to discipline the child with reasonable force. The

Ogg-Moss case also suggests that the Criminal Code defence is not available to volunteers working with mentally handicapped adults, as the resident in that case who had a mental age of five (5) and a physical age of twenty-two (22) years was considered neither a pupil nor a child within the meaning of s.43.

Duty to Report Suspected Child Abuse or Neglect

Volunteers working with children should be aware of the provisions of s. 3 (1) of the Alberta Child Welfare Act. Under this section, a person with reason to believe that a child is being abused or neglected has a duty to report the grounds for this belief to child welfare authorities:

> Any person who has reasonable and probable grounds to believe and believes that a child is in need of protective services shall forthwith report the matter to a director.

Any person who fails to report suspected child abuse or neglect to the Department of Social Services may be liable to a maximum fine of $200 or, in default of payment, imprisonment for up to six (6) months under s.3(6) of the Act.

2. THE VOLUNTEER DRIVER

When a volunteer is engaged as a driver, generally the passenger is non-paying, and the volunteer is held to a lower standard of care than that which the reasonable man would exercise. Under s. 182(1) of the Alberta Highway Traffic Act, a gratuitious passenger has no cause of action for damages unless the accident is caused by the gross negligence of the driver:

> No person transported by the owner or driver of a motor vehicle as his guest without payment for the transportation has any cause of action for damages against the owner or driver for injury, death or loss, in case of accident, unless:
>
> (a) the accident was caused by the gross negligence or wilfull and wanton misconduct of the owner or operator of the motor vehicle, and
>
> (b) the gross negligence or wilfull and wanton misconduct contributed to the injury, death or loss for which the action is brought.

Gross negligence has been described as "very great negligence". The distinction between slight, ordinary and gross negligence is difficult to define. The definition of "gross negligence" applied in the gratuitous passenger cases is "a marked departure from the standards of a careful driver or a conscious wrongdoing on the part of the driver".

If a volunteer accepts payment in the form of a mileage allowance or other compensation for expense, he risks being regarded as a person transporting passengers for hire or gain. Under s. 182(2) of the Highway Traffic Act, the gross negligence test does not apply to persons transporting passengers for hire or gain, and ordinary negligence is sufficient to sustain liability. A "guest without payment" may share transportation expenses without excluding a volunteer from the protection of the act where the purpose of the trip is social and not commercial and there is no prior agreement to share expenses. The court is likely to regard a volunteer driver's activity as a social favour and the sharing of expenses merely incidental. However, to be on the safe side, a volunteer should not agree in advance to accept a mileage allowance or other compensation for his services, as a formal agreement could be interpreted as a

commercial contract and transform the relationship to a business proposition.

Insurance Coverage

The standard of care which a volunteer is required by law to exercise affects the cost of his insurance coverage. If a volunteer is accepting mileage and therefore risking an increased exposure to liability for negligence, his insurance premiums will be higher. An insurance company which is not informed of the receipt of a mileage allowance may regard the volunteer's insurance policy as null and void. A volunteer driver should inform his insurance company of his volunteer activity, even if he is not receiving a mileage allowance or other compensation for his services.

Driving on a volunteer basis without any reimbursement for expenses is not likely to affect a person's automobile insurance premiums, but that depends on the regularity of the volunteer activity.

3. THE VOLUNTEER RESCUER

A rescuer is a type of volunteer. As with any volunteer activity, there is generally no duty to rescue. A person can with legal impunity stand on the sidewalk and without moving a muscle watch another person walk in front of a car. The law imposes no duty to act unless the potential rescuer created the situation of peril or falls within one of the statutory exceptions to the rule.

Under s. 526(1) of the Canada Shipping Act, a master of a vessel has a duty to render aid to every person found at sea and in danger of being lost. Under s. 236(1) of the Criminal Code, a person involved in an accident has a duty to remain at the scene of

the accident and render aid. Such exceptions are few in number, primarily because of the difficulties involved in enforcing a duty to rescue. If there are a group of by-standers, which by-stander is to be held responsible? What degree of risk should a by-stander assume in a rescue attempt? Should the person on the sidewalk have risked his own life to save the potential traffic victim?

Once a person undertakes a rescue attempt he assumes a duty of care. It is not clear whether the reasonable man test applies to a rescuer. The American cases suggest that reasonable care is the appropriate standard. However, British case law sets a lower standard: a rescuer is liable for negligence only if he worsens the situation. There is a decision of the Supreme Court of Canada **Horsley v. MacLaren: The Ogopogo**, that has been interpreted as imposing on a rescuer only a duty not to worsen the situation. However, this case concerned the duty of a first rescuer to a second rescuer and the principle formulated by the Supreme Court may be limited to that context alone. In **The Ogopogo** it was established that where one person attempts a rescue and through carelessness increases the danger, he may be liable for any injuries to a second rescuer who is thereby induced to assist.

Because of the potential liability for failure to exercise reasonable care in a rescue attempt, some people, including doctors, are reluctant to administer aid at the scene of an accident. Alberta has enacted legislation to deal with this problem. Under the Alberta Emergency Medical Aid Act, people, including medical personnel, who render emergency first aid assistance at the scene of an accident are liable only for gross negligence. The policy of this legislation is to encourage rescuers.

This policy led to another important feature of the law affecting rescuers. In the past, a rescuer who was injured in a rescue effort was not entitled to recover damages from the person in peril (rescuee) even when that person intentionally or carelessly placed himself in danger. The court argued that the

rescuer had voluntarily assumed the risk of injury and was solely responsible for his own damages. This approach was overturned in a landmark American decision, and a rescuer is now entitled to recover from a negligent rescuee provided the rescue attempt was warranted and not foolhardy. The court will consider the excitement, haste and confusion of the moment in determining whether the rescuer contributed to his own injuries, and a rescuer is not deprived of the right to recover if he makes an error of judgment.

4. THE VOLUNTEER COUNSELLOR

Liability for Advice Given Negligently

A volunteer may be in a position to give advice either because he is asked or because he has influence over the person he is assisting. The volunteer's influence may arise from the nature of the relationship or the dependency of the other person. Examples of volunteer activity which may involve the provision of information or advice are suicide prevention, acting as a big sister or brother, working for student legal services, planned parenthood, or shelters for youth or battered women.

At one time there was no risk of liability for giving bad advice. This changed with a leading English case, **Hedley Byrne v. Heller.** In that case, the court held that a person who gives advice negligently may be liable for damages if:

1. he has held himself out as possessing special skill and knowledge;
2. it was reasonably foreseeable that the injured party would rely on the advice;
3. the injured party relied on the advice given;

4. damages were sustained as a result; and

5. no statement was made disclaiming responsibility for the advice or qualifying the advice as given hastily and without sufficient inquiry.

These are the essential elements of negligent misstatement.

A person may be liable for negligent misstatement where the advice is given voluntarily. A contractual arrangement is not necessary to create a duty of care, but payment for advice is strong evidence that the injured party's reliance was foreseeable. To date, cases of negligent misstatement have involved advice given by professionals. Most volunteers do not function in a professional capacity and do not hold themselves out as possessing special skill and knowledge. Accordingly, a volunteer is not likely to incur liability for unsound advice, although his supervisor or the sponsoring agency may be held responsible.

Interference with Domestic Relations

Under s. 40 of the Alberta Domestic Relations Act, a person who, without lawful excuse, persuades a married person to leave his or her spouse against the married person's will is liable to an action for loss of consortium by the person persuaded to leave. "Loss of consortium" means the loss of the society and services of a spouse. At common law, deliberately inducing a wife to leave her husband could give rise to an action for "enticement" although no such action lies for mere advice.

Harbouring a spouse may also have legal implications. Under s.41 of the Domestic Relations Act, a married person has a right of action for damages against a

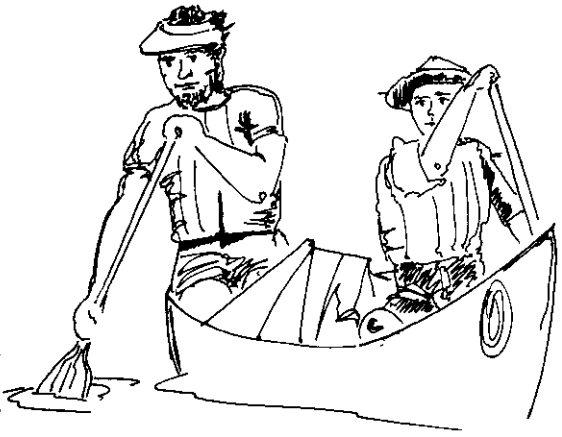
person who without lawful excuse knowingly harbours his or her spouse. Harbouring does not give rise to liability for damages when:

1. the plaintiff and his or her spouse are living apart by agreement or judicially separated;
2. the plaintiff is guilty of cruelty and the defendant harbours his or her spouse for reasons of humanity; or
3. the defendant has reasonable (and probable) grounds to believe that the plaintiff is guilty of cruelty and harbours the spouse from motives of humanity.

Inducing a child to leave his parents may expose a person to liability for enticement at common law. In an English case, a father successfully sued a nunnery which his daughter was persuaded to join. This action, originally formulated to provide compensation to parents for loss of a child's services, is outdated and seldom utilized.

Because of their potential liability for interfering in domestic relations, volunteers providing emotional support services should refrain from forcing their personal views on the people they are trying to help where domestic relationships may be affected.

II THE AGENCY'S RESPONSIBILITIES



1. THE AGENCY'S DUTY OF CARE

An organization that relies on volunteer services owes a duty of care towards its volunteers. This duty has three sources: the law of master and servant, the neighbour principle and the Alberta Occupiers' Liability Act.

The Law of Master and Servant

A volunteer/agency relationship is likely to be regarded as a master/servant relationship where the agency has the right to control the volunteers' activities (see pages 5, 6 and 7). Under the law of master and servant, a master has a duty to provide proper instruction and supervision, to inspect and repair the work premises and equipment, to provide a safe system of work and to warn the servant of safety hazards associated with the job. A master who breaches this duty of care may be liable for a resulting injury to the servant. The master is not responsible for every occupational injury to his servants, for he is not an insurer of his servants' safety and must be at fault to be liable. Where an injury results from a latent defect in equipment or the servant's own carelessness, the master may not be responsible.

There are several Canadian cases involving "on the job" injuries to volunteers. In a British Columbia case, **Poppe v. Tuttle**, a farmer was held liable for an injury to a friend who assisted him as a volunteer

in harvesting his crops. The friend, while working with inadequate lighting, lost his arm in a combine machine which had been missing certain guards and shields. The court found that the farmer failed to take reasonable care to provide a safe system of work.

In a Manitoba case, **Huba v. Schulze and Shaw**, the plaintiff was severely injured while voluntarily assisting the defendant in moving from one residence to another. The court found that the defendant was liable as a master for negligently exposing the plaintiff to an unsafe system of work.

The Neighbour Principle

In the **Huba** case, the court held that the defendant's liability could be founded on the neighbour principle apart altogether from considerations of master and servant. A volunteer is a "neighbour" because he is directly and closely affected by the acts of those in charge of his activities (see page 2). An agency is not excused from liability for injuries which were reasonably foreseeable, merely because the volunteer does not accept compensation for his services. As the court observes in **Huba**:

> **One who, like the plaintiff, agrees to assist another without payment is not thereby denied of legal rights and left without protection... The law looks on the conduct of the parties in the relationship in which they stand. If in such a relationship a reasonable and prudent man would be expected to exercise care and attention towards persons who foreseeably might suffer injury through his lack of such care and attention, the law will insist upon compliance with that duty of care and will impose liability for its breach. Friendly though the arrangement between the parties may have been, and without monetary consideration though it was, it still gave rise to a relationship in which the duty of care existed.**

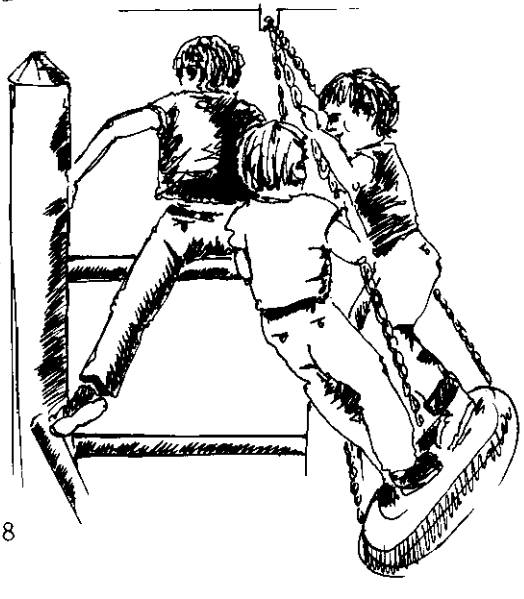
The Occupiers' Liability Act

An agency may be liable for injuries sustained by a volunteer while on its premises. Section 5 of the Act imposes on an occupier of premises a duty to use such care as in all the circumstances is reasonable to see that a visitor will be reasonably safe in using the premises for an authorized purpose.

An "occupier" is one who has physical possession of the premises or retains control over the condition of the premises, the activities conducted on the premises and the persons allowed to enter the premises. A visitor is any person whose presence on the premises is lawful. A volunteer falls within this definition of visitor, and is therefore entitled to the protection provided by the Act.

The case law suggests that foreseeability of injury is the appropriate test for determining whether the premises are reasonably safe. Premises may be unsafe in a variety of respects. Buildings in a poor state of repair, defective furniture or equipment, hazardous activities and the behavior of animals and persons on the premises are potential trouble spots for occupiers.

Because an occupier is responsible for the conduct of other people on his premises, an agency may be liable if a client injures a volunteer. Likewise, an organization may be liable as an occupier for the actions of a volunteer if, for example, the volunteer is careless in supervising children on the agency's playground. The Occupiers' Liability Act supplements the principles of vicarious and direct liability previously discussed (see pages 5, 6 and 7) as a source of agency



responsibility for the conduct of volunteers.

Occupational Health and Safety Act

In addition to the common law duty to provide a safe working environment an agency must conform to the safety standards set by the Alberta Occupational Health and Safety Act, if its volunteers are engaged in an "occupation" as defined by the Act. The Act applies to any worker engaged in an occupation. The Designation of Occupations Regulations specify a broad range of occupations covered by the Act, including education counsellors, writers, translators, librarians, lawyers, fire-fighters and occupations in welfare and community services. Section 2(1) of the Act imposes on employers a duty to ensure the health and safety of workers and others present on a work site. Section 2(2) requires a worker to take reasonable care to protect the health and safety of himself and other workers and to cooperate with his employers for this purpose. Other provisions of the Act set standards for reporting and investigating of accidents. Regulations made pursuant to the Act set specific safety standards for particular industries.

Contravention of the Occupational Health and Safety Act and regulations is an offence under s. 32(1) of the Act. The penalty for a first offence is a maximum fine of $15,000 and an additional $1,000 for each day during which the offence continues, or

imprisonment for a term not exceeding six (6) months. A second offence carries a maximum fine of $30,000 and a further $2,000 for each day that the offence continues, or imprisonment for a term not exceeding twelve (12) months.

2. DEFENCES AVAILABLE TO AGENCY

There are a number of defences that an agency could raise to an allegation of negligence if a volunteer is injured on the job.

Standard Practice

The agency may have taken standard precautions to prevent injury to its volunteers. Compliance with general practice is a defence to a negligence claim, provided the practice is acceptable. If a volunteer is injured on an agency-sponsored canoe trip, the agency could argue in answer to an allegation of negligence that it provided the volunteer with the training, testing, supervision and life-saving equipment customarily required by canoe clubs and similar organizations. This defence will not succeed if the court decides that the customary precautions are inadequate. A standard practice may also be a bad practice.

Voluntary Assumption of Risk

The agency in the above canoe trip example could argue that the volunteer willingly assumed the risk of injury when he agreed to participate in the activity. There are two essential elements of the defence of voluntary assumption of risk or its Latin equivalent "**volenti non fit injuria**": a comprehension of the risk of injury and an express or implied assumption of this risk. This defence is rarely successful, as the courts

are reluctant to infer from mere participation in an activity an assumption of the associated risks. Under s. 7 of the Occupiers' Liability Act, the defence is available to an occupier of premises.

Defence of Common Employment

The defence of common employment is an offshoot of the voluntary assumption of risk argument peculiar to master/servant relationships. Until the defence was abolished in Alberta by The Defence of Common Employment Act (now s.43 of the Judicature Act), an employer could argue that an employee injured on the job by another worker voluntarily assumed the risk of his fellow servant's negligence. This principle has been applied to volunteers, but is of little assistance to agencies which rely on volunteer services in those provinces which have abolished the defence.

Agreement Excluding Agency's Liability for Injury to Volunteer

Some volunteers are asked to sign an agreement stating that they do not hold the agency responsible for any claims for loss or damage to their person or property. Agreements excluding or limiting liability for damages are called waivers, disclaimers or exclusion clauses. The courts generally do not favour such provisions and seldom enforce them. To be effective as a defence in a court action, a clause excluding liability must name the precise cause of action and type of damages involved. A comprehensive exclusion clause is difficult to compose, as broad language may be too general and specific language may not anticipate every possible occurance.

Even a suitably drafted exclusion clause could be struck down in court, on the ground that the clause is unconscionable. This means basically that the agreement is unfair and one-sided. The courts look

to the reasonableness and surrounding circumstances of certain agreements before deciding whether or not to enforce them.

Contributory Negligence

Every person has a duty to take care for his own safety. An agency could argue that a volunteer injured on the job carelessly contributed to his own injury. Contributory negligence reduces the amount of damages recoverable (see page 16).

3. MINIMIZING THE RISKS

Prevention

An ounce of prevention is worth a pound of cure. An agency can protect itself against liability to or for its volunteers by preventative measures such as effective screening at the hiring stage, proper training and supervision and the provision of a safe working environment.

Insurance

An agency may obtain liability insurance to protect itself from direct liability for "on the job" injuries to volunteers as well as vicarious liability for a volunteer's tortious acts (see pages 5, 6 and 7). Volunteers may be similarly protected under an individual policy or under the agency's insurance package. The agency's coverage can be extended to provide liability protection to volunteers by special arrangement with the insurer for an additional premium. Accident insurance may likewise be obtained on a volunteer's behalf. The cost of this extra coverage

depends on the degree of risk associated with the volunteer's activities. Where the risk of accident or liability for negligence is not significant, the additional premium will be nominal. An agency wishing to purchase insurance coverage for its volunteers should discuss the matter with its insurance company or shop around, if necessary, to obtain the type of coverage desired.

A volunteer engaged as a driver is personally responsible for obtaining adequate automobile insurance coverage if he drives his own vehicle. Some agencies may request that he increase his present coverage when he assumes his volunteer duties. A sponsoring agency may purchase non-owned automobile insurance to supplement the volunteer's coverage and protect itself in case it is held vicariously liable for the actions of a volunteer involved in a traffic accident. Where the volunteer drives an agency vehicle, the agency as owner of the vehicle is responsible for securing the necessary insurance.

Additional information on insurance coverage for volunteers is available in **The Legal Status of Volunteer Workers and Voluntary Organizations,** a report prepared for the Volunteer Centre of Calgary by Gerald Kemp.

Workers' Compensation

A volunteer in Alberta may be covered under the Alberta Workers' Compensation Act on the application of the agency sponsoring his activities. Workers' Compensation is a no-fault accident insurance scheme. A worker injured on the job in the course of performing his required duties may obtain compensation under the Act without having to prove that the employer was responsible for the injury. Section 9(4) of the Workers' Compensation Act, permits the Workers' Compensation Board to extend coverage to volunteers:

> "The Board may, on application by an employer or prospective employer proposing to engage persons in any

volunteer activity in which the remuneration, if any, is nominal, order that those persons are deemed to be workers to whom this Act applies."

Application for coverage under the Act cannot be made by a volunteer individually, but must be submitted to the Board in writing by the appropriate agency. An agency will be successful in bringing its volunteers within the protection of the Workers' Compensation Act only if the following conditions are satisfied:

1. The volunteers are engaged in connection with an organized project, endeavour or activity;
2. The organization is able to control and record the hours of work of the volunteers; and
3. A value of service is set for the volunteer labour.

Persons temporarily employed without pay in emergency situations and volunteer firemen, ambulance attendants and others engaged in similar capacity are automatically covered by Workers' Compensation pursuant to regulations under the Act.

The cost of Workers' Compensation coverage is borne by the agency sponsoring the volunteer's activity and depends on the value of the volunteer's service and the "assessment rate" for the activity. The value of a volunteer's service is equivalent to the going rate earned by paid staff performing the same job duties. The assessment rate is a number which reflects the comparative degree of risk associated with the activity. For example, fire-fighting is likely to have a higher assessment rate than operating the register in a hospital gift-shop, because the former occupation involves a greater risk of injury.

Volunteers are entitled to the same benefits as paid staff under the Act, including compensation for loss

of income in the event of an injury. The calculation of the volunteer's loss of income is based on his regular earnings or the average rate of pay for work of a similar nature. Workers insured under the Workers' Compensation Act are restricted to the remedies provided under the Act and have no right to sue the employer for negligence.

4. HIRING A VOLUNTEER: DISCRIMINATION

Can a person be denied a volunteer position on the basis of his race, religious beliefs, colour, sex, physical characteristics, age, ancestry or place or origin?

The Individual's Rights Protection Act

Section 7 of the Alberta Individual's Rights Protection Act prohibits discrimination by employers in hiring and employment practices. The Act provides no definition of employment, but the Human Rights Commission has indicated that should the status of a volunteer become an issue in a human rights inquiry, the Commission is likely to adopt the definition of employee contained in the Alberta Employment Standards Act and Labour Relations Act. These acts define an employee as one who works for wages. A volunteer is therefore not protected under the "discrimination in employment" provisions of the Individual's Rights Protection Act.

There is another section of the Act which may assist a volunteer who believes he is the victim of discrimination. Section 3 prohibits discrimination against any person with respect to the use of facilities customarily available to the public. A person who is denied a volunteer position in a school, hospital, camp or recreation facility for discriminatory reasons could argue that he has been denied access to facilities

customarily available to the public in contravention of provincial human rights legislation. This is not a promising argument in view of the narrow interpretation of "services and facilities customarily available to the public" adopted by Canadian courts. In Saskatchewan, the court has held that a hospital is not a facility to which the public is customarily admitted. The Ontario Court of Appeal has held that the structured program offered by a soft-ball league was not a service or facility within the meaning of the Ontario Human Rights Code. The scope of protection provided by s. 3 of the Act is significantly diminished by these decisions.

Although volunteers are not likely to be protected by the Individual's Rights Protection Act, the Human Rights Commission may in appropriate circumstances accept and pursue a complaint on behalf of a volunteer. To date there has been no test case to determine whether or not discrimination against volunteers is a violation of the provincial legislation.

The Tort of Discrimination

In 1979, the Ontario Court of Appeal recognized discrimination as a tort. The effect of this decision was to grant a right to sue to persons who had been discriminated against on the basis of race, creed, colour, sex, marital status, nationality, ancestry or place of origin. This cause of action was short-lived, as the Supreme Court of Canada has overturned the Ontario Court's decision. The Supreme Court of Canada rejected the newborn tort on the grounds that the Ontario Human Rights Code provides the only available remedy in discrimination cases. The same reasoning would apply to the Alberta Individual's Rights Protection Act, and a volunteer in Alberta is therefore limited to the protection afforded by the legislation.

5. DISMISSING A VOLUNTEER

The Employment Standards Act

The Alberta Employment Standards Act sets minimum standards for the dismissal of employees in Alberta. An employer may not terminate an employee without giving the proper notice or a sum of money in lieu of notice as specified in the Act. No notice or payment is required if the employee is dismissed for just cause. An employee is defined in s. 1(1)(c) of the Act as "an individual employed to do work who is in receipt of or entitled to wages". Accordingly, a volunteer is not entitled to the protection of the notice provisions contained in this legislation.

The Labour Relations Act

The Alberta Labour Relations Act is another statute which provides protection to employees who are members of a registered union. A union is a bargaining agent for its members. Generally, if a group of employees is represented by a union, the union and employer enter into a collective agreement which regulates the conditions of employment, including the dismissal of employees. An employee who is dismissed in contravention of the standards set by the collective agreement is entitled to seek a remedy in the manner provided by the collective agreement. An internal grievance procedure is the usual mechanism for bringing such a complaint. If this procedure is unsuccessful, the matter may be decided by an independent third party known as an arbitrator. The Labour Relations Act facilitates the formation of unions and the enforcement of collective agreements. The Act applies to employees, and an employee is defined in s. 1(k) of the Act as "a person employed to do work who is in receipt of wages". Volunteers do not fall within this definition and accordingly are not entitled to form a union under the Labour Relations Act or rely on the Act to enforce a collective agreement.

Action for Wrongful Dismissal

At common law, an employee who is dismissed without proper notice may sue for wrongful dismissal if his employer had no just cause to terminate his employment. An employee who succeeds in an action for wrongful dismissal is generally awarded damages equal to the pay he would have earned had he received the appropriate notice, although in some cases the courts have included damages for emotional suffering. The notice required depends on a number of factors including the length of employment, the pay period, and the nature and degree of responsibility associated with the job.

There are no reported cases of wrongful dismissal involving volunteers. It is unlikely that a volunteer could sue for wrongful dismissal. Volunteer work is generally performed at the pleasure of the volunteer and the sponsoring agency, and either party is free to terminate the relationship at any time, provided there is no negligence involved in such termination (see pages 16 and 17).

If a volunteer is engaged as an apprentice, however, he may have an action for wrongful dismissal. The working relationship between an apprentice and his employer can be terminated only by the agreement of both parties, in the absence of misconduct on the part of the apprentice. In an English case, **Dunk v. George Waller & Son Ltd.**, an apprentice, who was wrongfully dismissed, recovered damages for loss of earnings and training during the remainder of the apprenticeship, as well as damages for loss of future prospects. A volunteer apprentice may likewise be entitled to recover damages for loss of education and opportunity.

6. UNLICENCED PRACTICE OF A PROFESSION

An agency has a responsibility to ensure that volunteers

are properly licenced to perform activities which require a special licence or approval from a professional association. For example, under s. 93 of the Legal Profession Act of Alberta, no person may practice as a lawyer unless he is an active member of the Alberta Law Society. Specific exceptions are set out in the Act. There are similar rules for doctors, nurses, pharmacists, engineers, teachers and numerous other professions. An agency which utilizes volunteers to perform activities for which they are not professionally qualified may be penalized under the relevant legislation or held liable for negligence if the volunteer injures a client (see pages 5, 6 and 7). Under s. 177 of the Alberta School Act, a school board that knowingly employs as a teacher a person who does not hold a valid teaching certificate is guilty of an offence and liable to a fine of up to $500.

III THE VOLUNTEER BOARD MEMBER

A director of a charitable or non-profit organization is a special type of volunteer because he acts on behalf of the agency which he serves. As a representative of the organizaton, he must discharge the agency's responsibilities as well as his personal duties to the organization, its members, and its clients.

1. LIABILITY FOR FINANCIAL OBLIGATIONS OF THE AGENCY

Is a volunteer board member personally liable for the agency's financial obligations? The answer to this question depends on the nature of the obligation and the structure of the organization.

Structure of the Organization

A charitable or non-profit agency in Alberta may be an association, a society incorporated under the

Alberta Societies Act, or a non-profit corporation formed under provincial or federal legislation. Generally, a non-profit corporation which carries on its activities in a number of provinces is incorporated under Part II of the Canada Corporations Act, and a non-profit corporation whose activities are largely confined to Alberta is incorporated under Part IX of the Alberta Companies Act.

The essential difference between a non-profit corporation and a business corporation is that the members of a non-profit corporation, unlike shareholders of a business corporation, are not entitled to share in the profits of the organization. A non-profit corporation may make a profit but it is not permitted to distribute any of that profit among its members.

Debts

The most important feature of incorporation is the creation of a legal entity distinct from its members. A corporation is a "person" in the eyes of the law and may, as such, institute legal proceedings and enter into contracts in its corporate name.

Because a corporation is a separate legal entity and not merely the sum of its members, no member is individually liable for paying its debts. This principle is known as the principle of limited liability.

Members of a society incorporated under the Societies Act are likewise insulated from liability for the society's debts. Under s. 17 of the Societies Act, no member of a society is, in his individual capacity, liable for a debt or liability of the society. There is no definition of "member" contained in the Act, and it is not clear, therefore, whether or not the limitation of liability provided in s. 17 would protect a member acting in the capacity of a director. The fact that a director is also a member is no guaranty that he will not be held liable for the society's financial obligations. Legislation in

other provinces is less ambiguous. In British Columbia, as long as a society has more than three directors, the directors are not liable for its debts. Since the Alberta statute does not address the issue of a director's liabilities in this regard, the common law principle applicable to corporate directors would apply, as a society in Alberta is a corporate entity.

Under the common law, the principle of limited liability extends to directors and protects them from liability for the debts of the corporation. This statement demands qualification: In some cases, the courts have chosen to disregard the "corporate veil" and hold directors personally liable for the company's financial obligations. In such cases, the courts have asserted that the directors control the organization and must be held accountable should they direct that a wrongful thing be done (such as perpetration of a fraud or public wrong). Aside from this and several other exceptions (discussed below), a corporate director and, accordingly, a director of a society are not liable for the financial obligations of the organization.

Members of an unincorporated association may also enjoy the benefit of limited liability depending on the nature of the organization and its membership. Members of non-profit clubs or associations are generally not required to pay any amount beyond the price of their subscriptions. The law recognizes that it is unrealistic to impose a greater degree of liability on the members of an organization of this kind, because they are not entitled to any share of the organization's profits and their membership is often of a transient nature. The directors of a non-profit association, however, may be personally liable for the agency's financial obligations, since they are directly involved in the management of its activities.

The foregoing is a general discussion of the extent to which directors of various types of non-profit organizations are liable for the agencies' financial obligations. The following obligations warrant

individual consideration.

Debts Assumed on Own Account

When a director of a corporation, society or association conducts the business of the organization in his own name and apparently on his own account, he may be liable for any debts he thereby incurs. For example, if a director were to apply for credit in his own name without disclosing to the lender the existence of the organization which is to benefit from the credit arrangement, he would probably be required to pay off the account should the organization fail to do so.

Employees' Wages

Directors of a non-profit corporation formed under the Alberta Companies Act or the Canada Corporations Act may be personally liable for up to six (6) months wages owed by the corporation to its employees.

There are certain conditions which must occur before a director will be required to reimburse an employee for unpaid wages. Under s. 91 of the Alberta Companies Act, no director is liable in an action brought by an employee to recover wages owing unless:

1. the company is sued or judgment is obtained against the company within one year after the debt becomes due;
2. the employee is unable to recover the full amount of the judgment from the company; and
3. the director is sued within one year from the time he ceased to be a director.

In addition, the services for which the wages are payable must have been performed while the director was acting as a board member.

Under s. 99 of the Canada Corporations Act, a director is not liable for unpaid wages unless:

1. the company has been sued for the debt within six (6) months after it has become due and the employee is unable to recover the full amount of the judgement from the company, or the company has dissolved or gone into bankruptcy; and

2. the director is sued while a board member or within one (1) year after he ceased to be a board member.

Under this legislation also, the unpaid wages must have been earned while the director was acting as a board member.

There are no similar provisions in the Alberta Societies Act. The act does not impose on directors of societies any obligations to satisfy employee wage claims. Under sections 107 and 108 of the Employment Standards Act, however, the director of a society may be found guilty of an offence for failure to pay wages to which an employee is entitled, and a judge may require a director to pay on behalf of each employee affected the difference between the wages actually paid and the wages that should have been paid by the society.

Employee Income Tax Deductions

Under s. 153 (1) of the Canada Income Tax Act, an employer is required to make certain deductions from his employees' wages and remit the amount withheld to the Receiver General for Canada. An employer who fails to make the necessary deductions is liable to pay the government ten per cent (10%) of the amount that should have been withheld plus interest

and is guilty of an offence under the Act which carries a fine between $200 and $10,000 and a possible prison term of up to six (6) months.

Where a corporation fails to make or remit the employee deductions required by the Income Tax Act, directors of the corporation are personally liable under S. 227.1 of the Act to pay the amount which the corporation is required to pay including any interest or penalty. A director is not insulated from this liability merely because he is not actively involved in the management of the corporation or has delegated his responsibilities with respect to financial matters to apparently competent officials. A director may be free of liability, however, under s. 227.1 (3) of the Act if he has exercised the degree of care, diligence, and skill to prevent the corporation's default that a reasonably prudent person would have exercised in comparable circumstances. This entails, at the very least, ensuring that the monies required to be deducted are kept in a separate bank account, apart from other corporate monies.

These provisions of the Income Tax Act apply to directors of non-profit corporations. Directors of societies incorporated under the Societies Act are probably also subject to the sanction of s. 242. Section 242 applies to a director of a corporation. The word "corporation" is not defined in the Income Tax Act, and it is not clear therefore whether or not a society is a corporation within the meaning of that Act. Under the Societies Act, a society is a corporation. Section 10 of the Act states that the members of a society incorporated under the Act are a corporation. The use of the word "incorporate" to describe the formation of a society under the Act also suggests that a society is a corporate entity. Revenue Canada has interpretted a corporation as an entity created by law having legal personality and existence apart from that of its creators or owners. A society in Alberta has a separate legal identity, because pursuant to sections 12, 14 and 15 of the Societies Act, a society has all the powers of a corporation and may transact business on its own account. The description of a society which is provided in the Societies Act suggests that it would be considered a corporation for the purpose of s. 242 of the Income Tax Act. Directors of societies as well as non-profit corporations are accordingly subject to personal liability for failure to make the employee wage deductions required by s. 153(1) of the Income Tax Act.

2. DIRECTOR'S RESPONSIBILITIES

Fiduciary Duties

The relationship between a director and the organization

which he serves is called a "fiduciary" relationship. This kind of relationship exists whenever one person, called a "fiduciary", undertakes to act in the interests of another. Directors, agents, trustees, employees, lawyers and executors are some examples of fiduciaries. The fiduciary obligations imposed on directors include a duty of loyalty to the organization which he serves, a duty of honesty in his dealings with the organization, a duty to act in the best interests of the organization, and a duty to act with the utmost good faith. A director may not use his position for his personal advantage. He must exercise his power towards a proper purpose and not for ulterior motives. He is required to disclose any personal interest he may have in an agency transaction and report any potential conflict of interest which may affect his decisions.

A fiduciary is directly liable for a breach of his fiduciary obligations. A board member who misappropriates agency funds is liable to account to the Crown, the agency, the donor or the intended recipient for the amount of the misused monies and any profits he may have earned with them. A director who takes personal advantage of an opportunity available to the organization he serves may be required to surrender to the agency any benefits so acquired. For example, if an agency has an opportunity to lease certain premises and a board member takes personal advantage of this opportunity and rents the premises himself, the court may hold that the board member has rented the premises on behalf of the agency.

Statutory Duty to Disclose Personal Interest in Agency Transaction

The duty of a director of a non-profit corporation to disclose any interest that he may have in an agency transaction is codefied in s. 92 of the Alberta Companies Act and s. 98 of the Canada Corporations Act. Both Acts require such disclosure at the board meeting in which the transaction is discussed or the

first board meeting after the director becomes interested in the transaction. The director is to give a general notice of his interest to his fellow board members and refrain from voting on the matter.

Duty of Care

Directors may be personally liable for negligence in managing the agency's affairs, but not for mere errors of judgment. As mentioned previously, negligence involves the breach of a required standard of care (see pages 2 and 3). The degree of care that a director is bound to exercise was established in an English case, **Re City Equitable Fire Insurance Company Limited.** In that case the court stated that a director must exercise the same degree of care than an ordinary man might be expected to take in the circumstances on his own behalf. The test is subjective, and the knowledge, skill and experience of the particular board member affects the standard of care that he must meet. Accordingly, a corporate lawyer or bank manager would probably be held to a higher standard of care in managing the agency's funds than would another board member with little or no business experience.

The standard of care that a volunteer board member would be expected to exercise is not clearly established by case law. The court could hold a volunteer director to a lower standard because of the need to encourage this type of volunteer activity. On the other hand, the court could impose a higher standard on a director of a charitable organization on the ground that he is a trustee and must exercise the degree of prudence required of a trustee in managing the agency's funds. A trustee is a person who holds legal title to an asset or sum of money for the benefit of another party called the beneficiary. A charitable organization functions as a trustee of the donations which the society receives. The intended recipients of the society's funds or services are the beneficiaries of the trust property. A trustee is required to

exercise the same degree of care in investing the trust property as a prudent man of business would take in managing his own affairs with a view to providing income for those who will take in the future, such as his dependants. He is not entitled to engage in high risk ventures. A director of a charitable agency may be required to exercise a similar degree of caution in spending or investing the agency's funds, if the trustee analogy is extended to the individual members of the agency's board. At present, the Alberta Institute for Law Research and Reform is working on an Act to consolidate the Societies Act, Part IX of the Companies Act, and several other provincial statutes governing non-profit organizations in Alberta. It is anticipated that the new legislation will clarify the standard of care that a director of a non-profit corporation or society is required to exercise in fulfilling his duties as a board member.

A nominal director, elected to an organization's board of directors for honorary purposes, is held to the same standard of care as his fellow members. Although a director's duties are of an intermittent nature and a director is not bound to give continuous attention to the affairs of the organization, he can not abdicate his responsibilities as a board member, while he remains a board member. A director is not bound to attend all board meetings but ought to attend whenever he is reasonably able to do so. There is a growing trend, particularly in the United States, to hold absentee directors responsible for wilfull neglect of their duties, where such neglect contributes to a loss sustained through another director's misconduct.

Directors are entitled to rely on trusted officers of the organization, such as the executive director, managers and supervisors. A board member is not liable for an officer's misconduct, unless he could have detected the problem and prevented it by proper supervision. In seeking outside advice from experts, a director must satisfy himself that the expert is properly qualified. A director is entitled to rely

on the opinions of qualified experts, provided he continues to exercise his own judgment and does not follow the advice blindly.

Use of Funds for Legitimate Objects

Directors are responsible for managing the agency's affairs in a manner that is consistent with the organization's objects, as set out in its constitution. If a non-profit agency's funds are not applied in accordance with the agency's objects, the relevant transaction may be considered void on the ground that the organization lacked the capacity to make the contract. This principle is known as the **ultra vires** doctrine. The doctrine applies whenever a person entrusted with certain powers exceeds his authority. An **ultra vires** transaction or by-law is void and unenforcable.

Under s. 13(2) of the Alberta Societies Act, the funds and property of the society are to be used and dealt with for its legitimate objects only. Any society that contravenes the Act is subject to a maximum fine of $100.

Under the Alberta Public Contributions Act, a charitable organization may be required to account for its distribution of public contributions. If a court finds that an organization is misapplying any of its funds or failing to apply its funds to the charitable purpose for which the contributions were obtained, the court may appoint a trustee to assume control of the organization's assets, pursuant to s. 13(1) of the Act, and the trustee may apply the assets to the charitable purpose for which they were obtained. This is a watchdog provision calculated to prevent the waste or misappropriation of charitable donations.

As mentioned previously (see page 46), a director may be personally liable for the misappropriation of agency funds.

Fraud

Directors may be held liable for participation in a fraud, breach of trust, breach of their fiduciary duties or negligence if they turn a blind eye to the fraudulent activities of a fellow board member or fail to take preventative action when suspicions are or should have been aroused.

Criminal Liability

A director is liable to prosecution for criminal acts which he commits, participates in or endorses in his capacity as a board member. A board member who steals from the agency he serves may be prosecuted under s. 288 of the Criminal Code. Under this section:

> **A person may be convicted of theft notwithstanding that anything is alleged to have been stolen was stolen...**
>
> **(b) by the directors, officers or members of a company, body corporate, unincorporated body or a society associated together for a lawful purpose from the company, body corporate, unincorporated body or society, as the case may be.**

There are other provisions of the Criminal Code which impose criminal liability on directors and agents of corporations. In addition, a number of federal and provincial statutes and regulations impose liability on directors for violations committed by the organization.

Tortious Liability

A director is not liable for the tortious acts of the agency which he serves. However, he is liable for tortious acts that he himself commits while acting on behalf of the agency. If a volunteer board member

published a defamatory statement while acting in his capacity as a director, both he and the agency he represented could be held liable for damages to the person defamed. The director could be held directly liable as the person who committed the tort, and the agency could be held responsible for his actions on the principle of vicarious liability (see pages 5 and 6).

3. MINIMIZING THE RISKS

Prevention

A volunteer board member may minimize the risks of personal liability by keeping himself informed of the board's activities, the agency's by-laws and constitution and the statutes and regulations governing the organization's activities. An efficient and accurate system for administering the agency's funds with adequate checks is recommended. Minutes of board meetings may serve as valuable evidence if some aspect of the board's performance becomes an issue in a court action. Job descriptions may be useful in the event of an employment dispute. Directors should be aware of the risks associated with the agency's activities and take appropriate preventative measures. Different types of insurance (liability, fire, accident, etc.) can be purchased to protect the agency's assets. These are just some suggestions and are no substitute for individual foresight and common sense.

Indemnification of Directors

Under s. 311 of the Companies Act of Alberta, a court may relieve a director from liability for negligence or breach of trust in a court action if it appears that the director acted honestly and reasonably and ought fairly to be excused. This provision applies

only to directors of non-profit corporations incorporated under the Alberta Companies Act. A director of any charitable organization may be similarly excused from liability under s. 41 of the Alberta Trustee Act, if he is regarded by the court as a trustee (see page 47).

An organization may wish to indemnify its directors against liability for negligence or breach of their fiduciary duties. An indemnity clause may be included in the organization's by-laws and such a clause would be effective in exonerating a director from liability for unintentional wrongdoing. It is unlikely that an organization could protect its directors from liability for reckless or deliberate misconduct, since an indemnification by-law that provided such protection would probably be declared void by the court. An absolute indemnification would not be warmly received by the court, because it could provide directors with an incentive to behave recklessly or engage in deliberate wrongdoing.

Liability Insurance for Directors

A director may insure against his own liability for negligence or mismanagement. The organization may also obtain liability insurance to protect its directors in the event that they are found liable for negligence or breach of their fiduciary duties. Although the use of agency funds to protect a director from liability for failing to fulfill his responsibilities is arguably inappropriate according to trust principles (because such an expenditure could be regarded as a misappropriation of the trust property), many non-profit organizations are doing so, and there is nothing in the relevant federal or provincial legislation to prohibit the practice.

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Correspondence with: Wayne C. Fenton,
Workers' Compensation Board -
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George K. Bryce,
Occupational Health and Safety
Division, Alberta Workers'
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TABLE OF CASES

This handbook was prepared as a general summary of the law as it relates to volunteers. It is intended as a guide only and not as a substitute for legal advice. It is not an authoritative nor exhaustive statement of the law on this subject and is not designed to resolve any particular legal issue which may confront a person involved in the volunteer sector. The purpose of this handbook is to inform volunteers and the agencies which they serve of the possible legal implications of volunteer activity in order that appropriate steps may be taken to minimize the risks associated with such activity.